IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 14TH JUNE 2007 / 24TH JYAISHTA 1929

CRL.A.No. 1272 of 2006(C)

SC.456/2004 of ADDL. SESSIONS COURT (ADHOC), KOZHIKODE

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APPELLANT:

S.SALIM, S/O. SYED MUHAMMED,
CONVICT NO.3147, CENTRAL JAIL, KANNUR.

BY ADV. SMT.REENA ABRAHAM(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA.

BY PUBLIC PROSECUTOR K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 8-6-2007 , THE COURT ON 14/06/2007 DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.Appeal No. 1272 of 2006

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Dated, this the 14th day of June 2007

JUDGMENT

In this Appeal preferred from the Central Prison, Kannur, the appellant who was the sole accused in Sessions Case 456 of 2004 on the file of the Addl. Sessions Court, Fast Track (Ahoc-I), Kozhikode. challenges the conviction entered and the sentence passed against him by the said court for an offence punishable under Part II of Section 304 I.P.C.

2. The case of the prosecution is that at about 4.30 p.m. on 24-4-2003 inside room No. 15/877 of Peruvayal Panchayath of Kuttikattoor Amsom, Velliparamba Desom, the accused out of his previous enmity towards Sreekandanthambi, a trader of Ayurvedic medicines committed murder of the said Sreekandanthambi by forcibly stamping him on his chest and abdomen.

3. On the accused pleading not guilty to the charge framed against him by the court below for an offence punishable under Sec. 302 I.P.C. the prosecution was permitted to adduce

evidence in support of its case. The prosecution altogether examined 9 witnesses as P.Ws 1 to 9 and got marked 12 documents as P.W.1 to 12 and 2 material objects as MOs 1 and 2.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He stated that there were several rental occupants in the building and that the testimony of P.W.2 that he saw the occurrence was false, that he had nothing to do with the occurrence in the case and that he is innocent.

5. Since the court below did not consider this to be a fit case for recording an order of acquittal under Sec. 232 Cr.P.C., the accused was called upon to enter on his defence and to adduce any evidence which he might have in support thereof. He did not adduce any evidence .

6. The learned Addl. Sessions Judge, after trial, acquitted the appellant of the offence of murder punishable under Sec. 302 I.P.C. but convicted him of the offence of culpable homicide punishable under Part II of 302 I.P.C. For the said conviction the appellant was sentenced to undergo rigorous imprisonment for 5

years and to a fine of Rs. 10,000/- and on default to pay the fine to suffer rigorous imprisonment for one year. It is the said judgment which is assailed in this appeal.

7. I heard Adv. Smt. Reena Abraham, the learned counsel who defended the appellant on State Brief and Adv. Sri. K.S. Sivakumar, the learned Public Prosecutor, who defended the State.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:

9. P.W.1 was a tenant of the very same two storied building in which the occurrence allegedly took place. He proved Ext.P1 F.I. statement. He is not an eye witness to the occurrence. He joined the persons who took the deceased to the hospital. P.W.2 who is the son of the landlord of the building claims himself to be the solitary occurrence witness. Ext.P2 scene mahazar was proved through him. P.W.3 is a witness to Ext.P3 inquest report. P.W.4 is the Circle Inspector of Police, Kasaba, Kozhikode. He arrested the accused on 29-8-2003 and registered Ext.P6 F.I.R. under Sec. 41 (1) (a) Cr.P.C. pursuant to an anonymous

telephone call received by him. P.W.5 is the landlord of the building and father of P.W.2. P.W.6 is the Assistant Professor and Police Surgeon, Medical College Hospital, Calicut who proved Ext.P8 postmortem certificate. P.W.7 was the Special Village Officer, Kuttikatoor who proved Ext.P9 site plan. P.W.8 was the Assistant Sub Inspector of Medical College Police Station who recorded Ext.P1 F.I. statement of P.W.1 and registered Ext.P1 (a) F.I.R under the caption “unnatural death”. P.W.9 is the Circle Inspector of Police, Medical College, Kozhikode. He conducted the investigation. After the arrest of the accuse he sent Ext.P8 report for adding Sec. 302 I.P.C. in the place of “unnatural death”.

10. After hearing both sides and after perusing the oral and documentary evidence in the case, I am not satisfied that the prosecution has succeeded in bringing home the guilt of the accused beyond reasonable doubt.

11. P.W.1 was admittedly not an occurrence witness. in Ext.P1 F.I. statement he had no case that death of the deceased was homicidal. On the contrary, his case was that the deceased who was afflicted with cirrhosis had met with his natural death. But when examined before court he came out with a case that P.W.2 had told him that the deceased was stamped on the chest

and abdomen by the accused . But P.W.2 had no such case when questioned by the police during investigation. P.W.2 is the person who figured as the solitary eye-witness. He was questioned by the police thrice before the arrest of the accused. On none of the above occasions had P.W.2 told the police that he had seen the occurrence. The accused was arrested on 29-8-2003. It was on 30-8-2003, that is, four months after the occurrence that P.W.2 for the first time came out with a case that he had seen the accused stamping the deceased on the chest and abdomen. P.W.4 was the Kasaba Circle Inspector who had arrested the accused and had questioned P.Ws 1 and 2 during investigation. But the statements of P.Ws 1 and 2 recorded by P.W.4 were not produced in court. The explanation given by P.w.9 the investigating officer that since P.Ws 1 and 2 had given the very same statement which they gave to P.W.9, he did not consider it necessary to produce their statement, is not at all convincing. Eventhough P.Ws 2 and 9 admitted that the statement of P.w.2 under Sec. 164 Cr.P.C. had been recorded by the Magistrate, for reasons best known to the prosecution the said statement was not produced before court. The accused was thus prejudiced in shaping his defence on account of the non production of the 161

statements of P.Ws 1 and 2 as recorded by P.W.4 and the 164 statement of P.W.2 as recorded by the Magistrate.

12. The alleged confession made by the accused to P.W.4 at the time of his arrest is hit by Sec. 25 of the Evidence Act and is therefore not admissible. P.W.4 did not make any enquiry about the person who had made the anonymous phone call to P.W.4 giving the whereabouts of the accused leading to his apprehension by P.W.4.

13. The medical evidence only shows that death was due to blunt injuries to the chest and abdomen and that this can happen from a fall from the staircase. The deceased was suffering from chronic liver cirrhosis and the slightest shock or impact was sufficient to produce internal bleeding. P.W.9 had admitted that the deceased had fallen from the staircase on the previous day. Thus, the death of the deceased could as well be due to the fall from the staircase, which as per Ext.P2 is made of laterite stones with sharp edges. The conviction entered and the sentence passed by the court below overlooking these vital aspects cannot be sustained and are accordingly dislodged.

In the result this Appeal is allowed. The appellant is found not guilty of the offence punishable under Part II of Sec. 304

I.P.C. and are acquitted thereunder. He is set at liberty. He shall be released from prison unless his continued detention is found necessary in connection with any other case.

V. RAMKUMAR,
(JUDGE)

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V. RAMKUMAR, J.

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Crl.Appeal No. 1272 of 2006

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Dated, this the
14th day of June 2007

JUDGMENT